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Supreme Court, U.S.
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No. 91-2054

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,

Petitioners,

v.

VINCENT JAMES LANDANO,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether a practically irrebuttable presumption that any person or entity that communicates with the FBI about any matter during the course of a criminal investigation is "a confidential source" within the terms of Exemption 7D of the Freedom of Information Act, 5 U.S.C. § 552(6)(7)(d), conflicts with the plain language and legislative history of that Act.

2. In the alternative, if this Court concludes that the aforesaid presumption is not barred by the plain language or legislative history of the Freedom of Information Act, whether there is any factual or legal basis for the aforesaid presumption of confidentiality.

PARTIES TO THE PROCEEDING

Petitioners, the defendants below, are the United States Department of Justice and the Federal Bureau of Investigation. Respondent, the plaintiff below, is Vincent James Landano.

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 1

Statutory Provision Involved 2

Statement of the Case 2

Summary of Argument 7

ARGUMENT

POINT I

THE PRESUMPTION SOUGHT BY THE FBI IS CONTRARY TO THE PLAIN LANGUAGE OF THE FOIA 11

A. The Presumption Sought By The FBI Is, As A Practical Matter, Irrebuttable 12

B. The Presumption Of Confidentiality Is Inconsistent With The Plain Language Of The FOIA ... 14

1. The Presumption Renders Superfluous The Term "Confidential" 17

2. The FBI Premises Its Presumption Upon A Misreading Of Exemption 7(D) 20

3. The Presumption Sought By The FBI Would Relieve It Of The Burden Of Proof Expressly Imposed By Congress 21

POINT II

THE PRESUMPTION SOUGHT BY THE FBI IS CONTRARY TO THE LEGISLATIVE HISTORY OF THE FOIA 24

TABLE OF CONTENTS – Continued

Page

A. The Legislative History Favors A Case-Specific Determination That A Person Or Entity Is "A Confidential Source" 25

B. The 1974 Legislative History Expressly Disfavors The Use Of Presumptions Of The Sort Urged Here 29

C. The 1974 Legislative History And The Congressional Testimony Of Law Enforcement Representatives During The Hearings Preceding The 1986 Amendments Suggest A Narrow Definition Of "A Confidential Source" 33

D. The Legislative History Of The 1986 Revisions Provides No Support For The FBI's Presumption 37

POINT III

PRIOR DECISIONS OF THIS COURT UPHOLDING A CATEGORICAL APPROACH TO CERTAIN FOIA EXEMPTIONS DO NOT PROVIDE SUPPORT FOR THE FBI'S PRESUMPTION 41

POINT IV

THE FBI'S PROPOSED PRESUMPTION LACKS A FACTUAL AND LEGAL FOUNDATION 43

CONCLUSION 48

TABLE OF AUTHORITIES

Page

Cases:

Aspin v. *Dep't of Defense*, 491 F.2d 24 (D.C. Cir. 1973) 25, 26

Basic Inc. v. *Levinson*, 485 U.S. 224 (1988) ..... *passim*

Biberman v. *Federal Bureau of Investigation*, 528 F.Supp. 1140 (S.D.N.Y. 1982) 40

Brady v. *Maryland*, 373 U.S. 83 (1963) 10, 37, 46

Brant Constr. Co. v. *EPA*, 778 F.2d 1258 n.8 (7th Cir. 1985) 14

Center for National Policy Review of Race and Urban Issues v. *Weinberger*, 502 F.2d 370 (D.C. Cir. 1974) . 25, 26

Conoco, Inc. v. *United States Dep't of Justice*, 687 F.2d 724 (3d Cir. 1982) 14

Department of Air Force v. *Rose*, 425 U.S. 352 (1976) 10, 15, 45

Ditlow v. *Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974) 25, 26

Donovan v. *FBI*, 806 F.2d 55 (2d Cir. 1986) 14

Dow Jones & Co. v. *Department of Justice*, 908 F.2d 1006 (D.C. Cir.), superseded, 917 F.2d 571 (D.C. Cir. 1990) ..... *passim*

EPA v. *Mink*, 410 U.S. 73 (1973) 15, 30

FBI v. *Abramson*, 456 U.S. 615 (1982) 15

Ferguson v. *FBI*, 957 F.2d 1059 (2d Cir. 1992) 13

FTC v. *Grolier, Inc.*, 462 U.S. 19 (1983) 41, 42, 43

TABLE OF AUTHORITIES – Continued

Page

Irons v. *FBI*, 880 F.2d 1446 (1st Cir. 1989) (en banc) 14

John Doe Agency v. *John Doe Corporation*, 493 U.S. 146 (1989) 15, 24

Johnson v. *United States Dep't of Justice*, 739 F.2d 1514 (10th Cir. 1984) 14, 40

Kungys v. *United States*, 485 U.S. 759 (1988) 22, 23

Lame v. *United States Dep't of Justice*, 654 F.2d 917 (3d Cir. 1981) (*Lame I*), appeal after remand, 767 F.2d 66 (3d Cir. 1985) (*Lame II*) ..... *passim*

Landano v. *Rafferty*, 126 F.R.D. 627 (D.N.J. 1989), rev'd, 897 F.2d 661 (3d Cir.), cert. denied, 111 S.Ct. 46 (1990) 3

Landano v. *United States Dep't of Justice*, Civ. Action No. 90-1953 (D.N.J.) 3

Landano v. *United States Dep't of Justice*, 751 F.Supp. 502 (D.N.J. 1990) 12

Landano v. *United States Dep't of Justice*, cert. denied, No. 92-161 (Oct. 5, 1992) 7

Malizia v. *United States Dep't of Justice*, 519 F.Supp. 338 (S.D.N.Y. 1981) 40

Miller v. *Bell*, 661 F.2d 623 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982) 14

Nadler v. *United States Dep't of Justice*, 955 F.2d 1479 n.7 (11th Cir. 1992) 41

NLRB v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) 41, 42, 43

Parker v. *Department of Justice*, 934 F.2d at 378 ... 13, 14

TABLE OF AUTHORITIES – Continued

Page

Pennsylvania Dep't of Public Welfare v. *Davenport*, 495 U.S. 552 (1990) 17

Pollard v. *FBI*, 705 F.2d 1151 (9th Cir. 1983) 39

Radowich v. *U.S. Attorney*, Dist. of Maryland, 658 F.2d 957 (4th Cir. 1981) 39

Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 (1980) 46, 47

Schmerler v. *FBI*, 900 F.2d 333 (D.C. Cir. 1990) 13

Sims v. *Central Intelligence Agency*, 471 U.S. 159 (1985) 19

Terkel v. *Kelly*, 599 F.2d 214 (7th Cir. 1979), cert. denied, 444 U.S. 1013 (1980) 40

Texas Dep't of Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 21

United States Dep't of Justice v. *Julian*, 486 U.S. 1 (1988) 14

United States Dep't of Justice v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) ... *passim*

Vaughn v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) 13

Weisberg v. *United States Dep't of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1974) 25, 26, 29, 30

Wightman v. *Bureau of Alcohol, Tobacco & Firearms*, 755 F.2d 979 (1st Cir. 1985) 39

Yeager v. *Drug Enforcement Administration*, 678 F.2d 315 (D.C. Cir. 1982) 39

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

Freedom of Information Act:

5 U.S.C. § 552 2
5 U.S.C. § 552(a)(4)(B) 17, 21
5 U.S.C. § 552(b)(7)(D) ..... *passim*
5 U.S.C. § 552(c)(2) 18
5 U.S.C. § 552(*f*) 17
7 U.S.C. § 2561 15
12 U.S.C. § 1841 15
15 U.S.C. § 1635 15
15 U.S.C. § 1667b(a) 15
15 U.S.C. § 3608 15
16 U.S.C. § 773h(e) 15
17 U.S.C. § 302(e) 15
18 U.S.C. § 343(1) 15
18 U.S.C. § 1466(b) 15
18 U.S.C. § 1469 15
21 U.S.C. § 379a 15
21 U.S.C. § 885 16
26 U.S.C. § 6867 16
28 U.S.C. § 1254(1) 2, 16
28 U.S.C. § 2254d 16

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. § 464 16
30 U.S.C. § 921 16
33 U.S.C. § 920 16
35 U.S.C. § 282 16
35 U.S.C. § 295 16
38 U.S.C. § 108 16
38 U.S.C. § 1113 16
40 U.S.C. § 727 16
42 U.S.C. § 1216 16
50 U.S.C. § 403(a)(3) 19
Jencks Act, 18 U.S.C. § 3500 ..... 10, 46

MISCELLANEOUS:

120 Cong. Rec. 17,017 (1974) 30
120 Cong. Rec. 17,019 (1974) 27
120 Cong. Rec. 17,023 (1974) 31
120 Cong. Rec. 17,024 (1974) 31, 32
120 Cong. Rec. 17,028 (1974) 32
120 Cong. Rec. 17,029 (1974) 8, 32
120 Cong. Rec. 17,032 (1974) 32
120 Cong. Rec. 17,033 (1974) 26
120 Cong. Rec. 17,034 (1974) 26, 27
120 Cong. Rec. 17,035 (1974) 27

TABLE OF AUTHORITIES – Continued

Page

120 Cong. Rec. 17,037 (1974) 34

120 Cong. Rec. 17,040 (1974) 34

120 Cong. Rec. 17,041 (1974) 28

120 Cong. Rec. 36,871 (1974) 28, 29

132 Cong. Rec. 14,039 (1986) 40

132 Cong. Rec. 14,040 (1986) 39

132 Cong. Rec. 14,299 (1986) 38

132 Cong. Rec. 14,300 (1986) 39

Fed. R. Crim. P. 16 and 26.2 46

Rule 10(b)-5 23

Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts and Other Documents (1975) ..... *passim*

Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs, 96th Cong., 2nd Sess. (1980) 35, 37, 39

Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) ... 35, 37, 38

Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary on S. 774, 98th Cong. 1st Sess. (1983) 36, 37, 39

Freedom of Information Act: Hearings on S. 774 Before a Subcomm. of the House Comm. on Governmental Operations, 98th Cong., 2d Sess. (1984) 36, 39

TABLE OF AUTHORITIES – Continued

Page

H.R. Conf. Rep. No. 93-1380, 93d Cong., 2d Sess. 12 (1974) 19, 29

H.R. Rep. No. 91-1419, 92d Cong., 2d Sess. 16 (1972) 27

S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965) 15

Webster's Third New International Dictionary (1961) 29

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 956 F.2d 422. The opinions of the district court (Pet. App. 31a-47a, 48a-61a) are reported at 751 F. Supp. 502 and 758 F. Supp. 1021, respectively.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1992. A petition for rehearing was denied on April 14, 1992. (Pet. App. 62a-63a). The petition for a writ of certiorari was filed on June 22, 1992, and was granted

on October 5, 1992. (J.A. 45). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, provides in pertinent part:

(b) This section does not apply to matters that are –

* * *

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source * * * .

STATEMENT OF THE CASE

Respondent, Vincent James Landano, convicted of the 1976 murder of John Snow, a New Jersey police officer, was released from prison in July of 1989 following issuance, by a federal district court, of a writ of habeas corpus. The Third Circuit Court of Appeals reversed that

ruling, finding a failure to exhaust state remedies. *Landano v. Rafferty*, 126 F.R.D. 627 (D.N.J. 1989), *rev'd*, 897 F.2d 661 (3d Cir.), cert. denied, 111 S.Ct. 46 (1990). In issuing the writ, the district court found that investigators had engaged in a pattern of intentional suppression of evidence pointing to Mr. Landano's innocence and suggesting the guilt of another, Victor Forni, in the shooting of Officer Snow. *Landano v. Rafferty*, 126 F.R.D. at 646-55.

The investigation of the Snow murder was conducted by a team of local and federal investigators including the Federal Bureau of Investigation (FBI). (Pet. App. 2a). Indeed, in pretrial discovery, the prosecutor released to Mr. Landano investigative materials prepared by the FBI revealing the names and, in some cases the addresses, of 82 persons including witnesses and law enforcement personnel. (Certification of Neil Mullin dated December 21, 1990 in *Landano v. United States Dep't of Justice*, Civ. Action No. 90-1953 (D.N.J.)).

In September of 1988, the respondent filed a request with the FBI under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking information related to the Snow murder investigation. On January 10, 1989, the respondent made a second request to the FBI under the FOIA seeking files pertaining specifically to Victor Forni (J.A. 10; 15; 19 ¶¶ A and B).

On May 8, 1990, 19 months after respondent's initial request, the FBI released to him 324 pages of its 726-page file pertaining to Officer Snow. (Pet. App. 35a). On June 22, 1990, the Department of Justice informed respondent that the FBI was precluded from releasing any materials

pertaining to Victor Forni absent his express authorization to release information. (Pet. App. 35a-36a).[1]

Exhausting his administrative remedies, the respondent appealed to the Department of Justice both the FBI's decision to send him a redacted version of its Snow file and its decision not to send him its Forni file. (Pet. App. 36a). In addition to completely withholding 402 pages of the Snow file, the FBI redacted the disclosed portion severely. The FBI's submission to Mr. Landano, which included 106 pages of newspaper clippings and 38 pages of state subpoenas, provided no witness statements or FBI agents' notes concerning witness interviews. Adjacent to redacted sections, the FBI made handwritten references to Exemptions 7(C) and 7(D), in many instances citing them in tandem. (*See* J.A. 26 and Exhibit T referred to therein).

The Department of Justice affirmed the FBI's decisions with respect to the Snow and Forni files (J.A. 21, ¶ 5; 11, ¶ 15). On May 16, 1990, the respondent filed a complaint for injunctive relief under the FOIA seeking full disclosure of the Snow and Forni files. (J.A. 1).

The parties cross-moved for summary judgment. (J.A. 2). In so moving, the FBI relied upon the Declaration of Regina M. Superneau, a Special Agent of the FBI who

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[1] Ultimately, the FBI released a redacted file of materials pertaining to Victor Forni because Forni expressly waived any right to privacy. (Pet. App. 36a). The disclosed Forni materials are not in the record below, although the parties agree that this Court's ruling on Exemption 7(D) applies to those materials. (Pet. Br. at 4 n.3).

purported to be familiar with both the procedures followed in answering Mr. Landano's FOIA request and with the documents responsive thereto. (J.A. 18-42).

The Superneau Declaration does not describe even in general terms the circumstances surrounding FBI interviews of witnesses during the Snow murder investigation. Nor does the Declaration annex or discuss any FBI policies in 1976 to 1977[2] concerning the manner of interviewing witnesses, or the manner of providing and recording promises of confidentiality to witnesses in that time period. Finally, the Declaration does not state that FBI agents identified themselves as such to witnesses during the FBI's field investigation of the Snow murder. (J.A. 18-42; *see also* Pet. App. 25a). In her Declaration, Agent Superneau indicates that the FBI considers all witnesses, even those who anticipate public trial testimony, to be confidential sources within the meaning of Exemption 7(D). (J.A. 38-39).

In two opinions, the federal district court substantially granted Mr. Landano's motion for summary judgment and substantially denied that of the FBI. (Pet. App. 31a-61a).[3] In so ruling, the district court, in pertinent part, relied upon the holding of *Lame v. United States Dep't of*

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[2] Officer Snow was murdered on August 13, 1976; Mr. Landano was convicted on May 17, 1977. (Pet. App. 34a).

[3] The district court, however, granted the FBI's motion to withhold all FBI symbol source and file numbers, symbol numbers of confidential informants, individual rap sheet information, names of FBI informants or FBI undercover personnel, and information that could reasonably be expected to reveal the sources of confidential information. (Pet. App. 47a).

Justice, 654 F.2d 917, 923 (3d Cir. 1981) (*Lame I*), appeal after remand, 767 F.2d 66 (3d Cir. 1985) (*Lame II*), that "[w]hether there is an expressed or implied assurance of confidentiality is a question of fact to be determined in regard to each source." The district court found that the FBI "proffered no evidence to support its claim that persons protected by the FBI's withholding of information under Exemption 7(D) were confidential sources." (Pet. App. 53a-54a).

The FBI appealed and the Court of Appeals for the Third Circuit reversed the district court with respect to its rulings under Exemption 7(C) (Pet. App. 4a-17a), which are not at issue on this petition, but affirmed with respect to Exemption 7(D) (Pet. App. 17a-30a).

Judge Stapleton, writing for the panel, agreed that *Lame* was dispositive and required case-specific showings of confidentiality for each source. (Pet. App. 27a-28a). In so ruling, the Third Circuit rejected the FBI's argument that this Court's decision in *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), undermined the authority of *Lame*. Although recognizing that this Court approved of a categorical approach to Exemption 7(C) to avoid the judicial burden of performing "case by case balancing" of FOIA-based public interests and individual privacy interests, the Circuit observed that making a factual finding about whether or not a source is confidential does not impose such a balancing burden upon the courts. (Pet. App. 29a). Moreover, while noting that providing case-specific information about alleged confidential sources might be administratively burdensome for the FBI, the Third Circuit stated: "it was for Congress, rather than this Court,

to 'attempt to accommodate the[se] concerns.' " (Pet. App. 28a, quoting *Lame*, 654 F.2d at 929).

On April 14, 1992, the Third Circuit denied the FBI's petition for rehearing in banc (Pet. App. 62a-63a). This Court granted the FBI's petition for certiorari concerning the Exemption 7(D) ruling on October 5, 1992, while denying respondent's cross-petition on the Exemption 7(C) ruling. *Landano v. United States Dep't of Justice*, cert. denied, No. 92-161 (Oct. 5, 1992).

SUMMARY OF ARGUMENT

The Freedom of Information Act does not exempt the Federal Bureau of Investigation from its mandate for public disclosure of agency records. The presumption sought here by the FBI – that any person or entity that gives information to the FBI in a criminal investigation is "a confidential source" – would, in effect, provide such an agency-wide exemption, because (a) the primary business of the FBI is criminal investigation and (b) the FOIA permits withholding of *all* information provided by confidential sources in the course of criminal investigations. A presumption that *all* sources are confidential is at odds with the plain language and legislative history of the Act as well as the fundamental requirements for court-created presumptions.

The statute exempts information from "a confidential source," not all "sources." Clearly the two terms cannot be synonymous, if each term used by Congress is to have

meaning. Congress not only knows how to develop presumptions when needed to effectuate its statutory purposes, but has expressly used broader terms, like "persons," in other parts of FOIA, and expressly deleted the limiting adjective "confidential" from another part of Exemption 7(D). Contrary to the FBI's contention, the phrase "could reasonably be expected" describes the likelihood that "production of records" would lead to identification of confidential sources, not the likelihood that a source is confidential. The presumption sought by the FBI undermines also the burden of proof in FOIA cases expressly imposed on the government by Congress. Unlike normal presumptions, the one proposed here is virtually irrebuttable and weighs against the intended beneficiaries of the statute.

The legislative history fully supports the plain reading of the statutory language. First, in 1974, Congress expressly rejected a line of cases from the District of Columbia Circuit which, like the presumption suggested here, eliminated any agency burden to prove more than that a file was "investigatory." In its deliberations, Congress repeatedly referred to the need for case-specific determinations. Second, at the same time, Congress rejected a presumption of exemption even for sensitive, classified materials stating its intention that "when one is seeking public information . . . the matter will be heard by a judge free from any presumptions." 120 Cong. Rec. 17,029 (1974). Third, the legislative record, including repeated testimony by the FBI Director and other law enforcement personnel, confirms that "a confidential source" is a person or entity seeking to keep his, her or its identity anonymous or the information provided secret,

not every person or entity that speaks to law enforcement about a crime. Finally, the 1986 revisions, introducing the phrase "could reasonably be expected," heavily relied upon by petitioners here, expressly concerned the risk that criminal organizations could piece together a "mosaic" from even seemingly innocent information to determine a source's identity. The legislative history is clear that the FBI's alleged difficulty in proving that a particular source was promised confidentiality was *not* an issue raised by law enforcement or addressed by Congress.

This Court's ruling in *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), that categorical balancing may be appropriate in applying FOIA's Exemption 7(C), is inapplicable. The FBI's approach here is universal, not categorical. It does not seek to identify discrete categories of documents – such as code keys linking informant symbols with names – that invariably "could reasonably be expected" to disclose a confidential source's identity or information provided by that source. Rather, the FBI seeks a determination that the entire universe of persons and entities communicating with the agency in a criminal investigative setting are always "confidential source[s]" whose information is exempt. Moreover, this case does not present the judicial burden of balancing competing values and policies presented in *Reporters Committee*; a court here must merely undertake the ordinary and straightforward task of evaluating evidence to determine whether in fact a source was promised or impliedly assured of confidentiality.

In any case, the presumption sought fails to meet this Court's requirements for an evidentiary presumption, because it is unnecessary, inconsistent with the statutory policies, and factually unsupported. The evidentiary burden that Congress imposed on the agency is limited; it need show only that the source was told or impliedly promised that his or her identity would be kept confidential. Surely the FBI is capable of recording and reporting such basic information. The presumption would conflict with the "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). Moreover, the presumption would conflict with reality. The circumstances under which sources are interviewed are too varied to provide a basis for a presumption. At times witnesses provide details of the *res gestae* that are so seemingly insignificant as not to raise any confidentiality concerns. At other times, witnesses speak unknowingly to FBI agents who have not identified themselves as such and thus such witnesses have no expectations of confidentiality. In any case, constitutional and statutory discovery requirements, such as those imposed by *Brady v. Maryland*, 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. § 3500, make it impossible for an FBI agent to lawfully promise every source that they will remain anonymous or that their information will remain secret.

In sum, the language, history, and purpose of the Freedom of Information Act and the ordinary prerequisites to creation of an evidentiary presumption require that this Court affirm the judgment below and direct the

FBI, like all other federal agencies, to present case-specific information proving whether a person or entity speaking to the FBI was expressly or impliedly promised confidentiality.

ARGUMENT

POINT I

THE PRESUMPTION SOUGHT BY THE FBI IS CONTRARY TO THE PLAIN LANGUAGE OF THE FOIA

The court of appeals below, consistent with its prior ruling in *Lame v. United States Dep't of Justice*, 654 F.2d 917 (3d Cir. 1981) (*Lame I*), appeal after remand, 767 F.2d 66 (3d Cir. 1985) (*Lame II*), held that, in order for the FBI to demonstrate that a person or entity is "a confidential source" for purposes of the FOIA Exemption 7(D), the FBI must make an evidentiary showing detailing the factual basis for its claim that a source was expressly or impliedly promised confidentiality.[4] Here, the FBI provided no such proofs, (Pet. App. 54a), despite the clear mandate of *Lame I*, but rather contended that any time any person or entity communicates about any matter with the FBI during the course of a criminal investigation, such person or

[4] In *Lame I*, the Court declared that "[w]hether there is an expressed or implied assurance of confidentiality is a question of fact to be determined in regard to each source." 654 F.2d at 923. In this case, the circuit court stated, "[w]e believe *Lame*, fairly read, contemplates a showing by the government of the particular circumstances of an interview or source." (Pet. App. 23a).

entity should as a matter of law be presumed a "confidential source." The Third Circuit properly rejected that sweeping presumption.

The presumption urged by the FBI (Pet. Br. at 12) is at odds with the plain language of the FOIA. To demonstrate why, it is necessary first to clarify the nature and scope of the presumption.

A. The Presumption Sought By The FBI Is, As A Practical Matter, Irrebuttable

For some years, the Department of Justice has fought for judicial recognition of a presumption that *all* of the FBI's criminal investigatory sources are confidential for purposes of Exemption 7(D). In their brief, the petitioners extol "the accumulated wisdom" (Pet. Br. at 12) of circuit court decisions that embrace and define the FBI's presumption.[5]

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[5] In its formulation of the question presented here, and throughout its brief, the FBI mutes its claim of entitlement to a nearly irrebuttable presumption, preferring, at times, to speak in terms of the proofs necessary for a "prima facie" case under Exemption 7(D). *See, e.g.*, Pet. Br. at 12. Below, however, the FBI candidly insisted that the presumption it seeks is "close to an irrebuttable one," Defendants' Memorandum In Support of Motion for Reconsideration and for Stay Pending Appeal, at 6, *Landano v. United States Dep't of Justice*, 751 F.Supp. 502 (D.N.J. 1990) (No. 90-1953) (quoting *Dow Jones & Co. v. Dep't of Justice*, 908 F.2d 1006 (D.C. Cir. 1990)). As discussed above, many of the cases relied upon here by the FBI are likewise candid in their characterization of the presumption as practically irrebuttable. However characterized, the FBI seeks to create an evidentiary rule that requires a FOIA requester to shoulder an impossible burden of rebuttal.

In *Dow Jones & Co. v. Department of Justice*, 908 F.2d 1006 (D.C. Cir.), *superseded*, 917 F.2d 571 (D.C. Cir. 1990), cited with approval throughout petitioners' brief, the court "readily admit[ted] that the presumption [of confidentiality] in practical terms comes close to an irrebuttable one." 917 F.2d at 577. The court accurately observed that a FOIA requester would "rarely, if ever, have absolutely solid evidence that the source of an FBI interview . . . has manifested complete disregard for confidentiality." *Id.* Lest there be any doubt about the strength of the presumption, the *Dow* court emphasized that "only the starkest and most conclusive evidence of non-confidentiality will rebut the presumption." *Id.*

The *Dow* court is correct that, as a practical matter, the presumption is irrebuttable. Typically a FOIA requester must litigate in the dark, not knowing either the names or addresses of persons or entities contained in FBI files, or the circumstances under which they supplied information to the FBI. *See Vaughn v. Rosen*, 484 F.2d 820, 824-25 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). Thus, a FOIA requester is almost never in a position to rebut the presumed confidentiality of a source.

The FBI's ironclad presumption is not rebutted even if a FOIA requester demonstrates that at the time FBI sources were interviewed the sources knew they might have to testify about the subject of their interview in a public trial. *Schmerler v. FBI*, 900 F.2d 333, 338-39 (D.C. Cir. 1990). Nor will the fact that a source actually testified at an open trial serve as a waiver of any claim to confidentiality for purposes of escaping the reach of Exemption 7(D) according to these rulings. *Ferguson v. FBI*, 957 F.2d 1059 (2d Cir. 1992); *Parker v. Department of Justice*,

934 F.2d 375 (D.C. Cir. 1991); *Irons v. FBI*, 880 F.2d 1446 (1st Cir. 1989) (en banc); *cf., e.g., Brant Constr. Co. v. EPA*, 778 F.2d 1258, 1265 n.8 (7th Cir. 1985). Even if a district court examines FBI documents *in camera* and specifically finds "nothing in the document[s] to establish any implied confidentiality for the source[ ]," nevertheless the generic presumption of confidentiality is not overcome, and the documents may be withheld pursuant to Exemption 7(D). *Donovan v. FBI*, 806 F.2d 55, 61 (2d Cir. 1986) (quoting district court). Even in the extraordinary case where a FOIA requester supplies an affidavit from an FBI source specifying that in the course of a specific investigation the FBI gave neither express nor implied assurances of confidentiality, that affidavit has no evidential value in proving that sources other than the one named in the affidavit received no such assurances. *Miller v. Bell*, 661 F.2d 623, 627-28 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982). Indeed, according to the FBI, "a source need not have an absolute expectation of confidentiality in order to qualify as a 'confidential source' under Exemption 7(D)." (Pet. Br. at 20 n. 15).

Thus, the presumption the FBI seeks is sweeping indeed. It arises automatically: "[t]he agency need only 'state that the information was furnished by a confidential source and it is exempt.' " *Johnson v. United States Dep't of Justice*, 739 F.2d 1514, 1517 (10th Cir. 1984) (quoting *Conoco, Inc. v. United States Dep't of Justice*, 687 F.2d 724, 730 (3d Cir. 1982)). It is "almost irrebuttable." *Parker v. Department of Justice*, 934 F.2d at 378.

B. The Presumption Of Confidentiality Is Inconsistent With The Plain Language Of The FOIA

This Court has "consistently stated that FOIA exemptions are to be narrowly construed." *United States Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988); *see also John Doe Agency v. John Doe Corporation*, 493 U.S. 146, 152 (1989); *FBI v. Abramson*, 456 U.S. 615, 630 (1982); *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). This Court's policy of narrow construction is consistent with its view that the FOIA "is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973).

Given the broad purpose of the Act, there is to be " 'full agency disclosure unless information is exempted under *clearly delineated statutory language.*' " *Department of Air Force v. Rose*, 425 U.S. at 360-61 (1976) (emphasis supplied) (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)).

The FBI points to no "clearly delineated statutory language," *see Department of Air Force v. Rose*, 425 U.S. at 360-61, for its claim that a nearly irrebuttable presumption of confidentiality exists under the FOIA. Congress understands how to "clearly delineate" presumptions in its statutes[6], but

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[6] *See, e.g.*, 7 U.S.C. § 2561 (presumption re plant variety); 12 U.S.C. § 1841 (presumption of non-control by a company); 15 U.S.C. § 1635 (rebuttable presumption of delivery of required credit-related disclosures); 15 U.S.C. § 1667b(a) (presumptions re consumer leases); 15 U.S.C. § 3608 (rebuttable presumption of unconscionability); 16 U.S.C. § 773h(e) (rebuttable presumption of violation of fishing laws); 17 U.S.C. § 302(e) (presumption as to the author's death); 18 U.S.C. § 343(1) (presumption of being under the influence of alcohol); 18 U.S.C. § 1466(b) (presumption that a person is engaged in pornography business); 18 U.S.C. § 1469 (rebuttable presumptions re obscenity laws); 21

nowhere in FOIA is there *any* provision calling for the FBI's presumption.

Moreover, because the presumption is virtually irrebuttable, it eviscerates the Act. Under the FBI's reasoning, *all* information provided by *any* source during a criminal investigation may be withheld from a FOIA requester, absent the rare showing of facts rebutting confidentiality. *Dow*, 917 F.2d at 577 ("[T]he FBI typically promises confidentiality and rarely – if ever – will a source not desire it. . . . "). Because the vast majority of the FBI's files consists of information gathered from sources during criminal investigations, virtually all of the FBI's files could be withheld from FOIA requesters, under the FBI's view. All that need be released, given the presumption, is material the FBI has gathered from persons or entities who are *not* FBI sources, perhaps newspaper and magazine clippings compiled only by FBI agents.

U.S.C. § 379a (presumption of connection with interstate commerce); 21 U.S.C. § 885 (presumption re drug offenses); 26 U.S.C. § 6867 (presumptions, for IRS purposes, re physical possession of cash); 28 U.S.C. § 2254d (presumption of correctness of state court factual findings); 29 U.S.C. § 464 (presumptions of validity or invalidity of trusteeship); 30 U.S.C. § 921 (presumption that pneumoconiosis arose out of employment as a miner); 33 U.S.C. § 920 (presumptions re claims by longshoremen for workers' compensation); 35 U.S.C. § 282 (presumption of a patent's validity); 35 U.S.C. § 295 (presumption that a product was made by a patented process); 38 U.S.C. § 108 (presumption of death based on prolonged absence); 38 U.S.C. § 1113 (presumptions re veterans' disability benefits deemed rebuttable); 40 U.S.C. § 727 (presumption of lawful conduct); 42 U.S.C. § 1216 (presumption of death or detention).

Such a presumption amounts to the near exclusion of the FBI from coverage under FOIA, an effect at odds with Congress' inclusion of the FBI in 5 U.S.C. § 552(f). Moreover, as discussed below, the presumption conflicts with the plain language of both Exemption 7(D) and 5 U.S.C. § 552(a)(4)(B).

1. The Presumption Renders Superfluous The Term "Confidential"

Because the presumption is, for all practical purposes, irrebuttable, it has a definitional effect; the term "a confidential source" in Exemption 7(D) is effectively *defined* to mean *all* criminal investigatory sources. Thus, the presumption renders meaningless the statutory term "confidential." This Court's "cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990). If Congress intended, as the petitioners argue, that all sources in a criminal investigation be deemed confidential sources, then Congress would not have included the adjective "confidential" in the second branch of Exemption 7(D), which specifically treats information gathered during a criminal investigation.[7]

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[7] The pertinent portion of Exemption 7(D) provides as follows:

(b) This section does not apply to matters that are –

* * *

(7) records or information compiled for law enforcement purposes, but only to the extent that the production . . .

In contrast to Exemption 7(D), Exemption 7(B) uses the broad category "person" and 7(F) seeks to protect "any individual." While the FBI maintains that any person who supplies information during a criminal investigation is a confidential source, Congress carefully elected not to use the terms "person" or "any individual" in Exemption 7(D), but rather chose the narrower category, "confidential source."

Similarly, while the term "confidential source" expressly includes *some* "agenc[ies]," "authorit[ies]" and "institutions," it does not embrace *all* such entities. Only entities "which furnished information on a confidential basis" are deemed "confidential sources" within the terms of 7(D).

In contrast, elsewhere in the FOIA, Congress uses the term "informant," 5 U.S.C. § 552(c)(2), a narrower term than "confidential source." While many an "informant" is a "confidential source," not every "confidential source" is an "informant."[8]

> (D) . . . could reasonably be expected to disclose . . . in the case of a record or information compiled . . . in the course of a criminal investigation . . . *information furnished by a confidential source.*

5 U.S.C. § 552(b)(7)(D) (emphasis supplied). Had Congress intended that any criminal investigative source be automatically deemed "a confidential source," Congress would have written the emphasized phrase "information furnished by any source."

[8] In the course of drafting Exemption 7(D) in 1974, the conference committee substituted "confidential source" for "informer," to "make clear that the identity of a person other than a paid informer may be protected . . . " H.R. Conf. Rep. No. 93-1380, 93d Cong., 2d Sess. 12 (1974).

To summarize, the plain language of the FOIA reveals that in framing its exemptions Congress worked with categories and subcategories, the broadest of which is the universe of all persons and entities and the narrowest of which is the set of informants. Reasonably read, the term "confidential source" falls along that continuum, embracing many paid "informants," but only a limited subset of other persons and entities, *i.e.*, those that "furnished information on a confidential basis."

The FBI's sweeping presumption ignores Congress' careful distinctions by equating "confidential source" with *all* persons and entities who have provided information during a criminal investigation, thereby rendering the adjective "confidential" superfluous. In *Sims v. Central Intelligence Agency*, 471 U.S. 159 (1985), this Court, construing the term "intelligence sources" in 50 U.S.C. § 403(a)(3), recognized that the term "a confidential source" is far narrower than a general reference to "sources." Citing Exemption 7(D) by way of contrast, this Court stated, "Congress is capable of drafting legislation that narrows the category of protected sources of information." *Sims*, 471 U.S. at 169 n.13.[9]

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[9] Congress' intent that the adjective "confidential" retain meaning is confirmed by its 1986 amendments of Exemption 7(D). Congress deleted the adjective "confidential" before the word "information" but retained it before the word "source," in order to insure that *all* information provided by a confidential, but only a confidential, source could be withheld.

2. The FBI Premises Its Presumption Upon A Misreading Of Exemption 7(D)

The FBI argues that the phrase added to Exemption 7(D) in 1986 – "could reasonably be expected . . . " – provides a textual basis for its sweeping presumption. The FBI claims that this statutory language "is highly relevant" to the "pivotal issue in this case," to wit, "the nature of the FBI's *evidentiary burden*" in proving that a person or entity is a "confidential source." (Pet. Br. at 22) (emphasis in the original).

In truth, however, the phrase the FBI relies upon does not quantify the FBI's burden in proving a *source* to be "confidential." Rather, that phrase defines the FBI's burden in proving that *text* in a *document* poses a risk of exposing a confidential source's identity or information provided by that source.[10]

Exemption 7(D) simply does *not*, as the FBI imagines, exempt information provided by a source that "could reasonably be expected" to be confidential. Contrary to the FBI's claims, the "could reasonably be expected" language does not modify "confidential source." That phrase consists of a verb ("could be expected") modified by an adverb ("reasonably"), depicting what the subject of the sentence – "the production . . . of records or information"

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[10] The FBI cites *Dow Jones*, 917 F.2d at 578 (concurring opinion), as authority for the proposition that the "could reasonably be expected . . . " clauses "refer to the confidentiality of the *source*, not the interview or the information it yields." (Pet. Br. at 15) (emphasis in original). The cited passage does not even remotely provide such authority.

– may do. As a matter of simple grammar, the verbal/adverbial phrase "could reasonably be expected" cannot function as an adjective modifying the noun phrase "a confidential source." It thus provides no support for the FBI's claim that the 1986 amendment somehow expanded the scope of "a confidential source" to include all criminal investigative sources, or lightened the burden of proving a source to be "confidential."

3. The Presumption Sought By The FBI Would Relieve It Of The Burden Of Proof Expressly Imposed By Congress

The FOIA places "the burden . . . on the agency to sustain its action," in withholding information pursuant to exemptions. 5 U.S.C. § 552(a)(4)(B). The FBI concedes that, pursuant to that provision, it must prove, by a preponderance of the evidence, that information is exempt from disclosure. (Pet. Br. at 39-40).

Contrary to the foregoing allocation, the FBI's nearly conclusive presumption lightens the agency's burden of proof to the point of non-existence. As Circuit Judge Edwards observed, dissenting in *Dow* from denial of rehearing *en banc*, "A burden that is presumed satisfied is, of course, no burden at all." 917 F.2d at 580.

The FBI contends here that the presumption does not eliminate the FBI's burden of proof or shift the burden to the requester, but simply defines the quantum of evidence necessary to meet the burden of proving that a source is confidential. (Pet. Br. at 42). In that regard, the FBI seeks to equate its presumption with the presumptions created by this Court in *Texas Dep't of Community*

Affairs v. Burdine, 450 U.S. 248 (1981), *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), and *Kungys v. United States*, 485 U.S. 759 (1988).

The FBI's presumption is, in fact, distinctly different from the presumptions in those cases and unlike any presumption created by this Court because: (1) the FBI's presumption is virtually irrebuttable; and (2) the presumption weighs *against* the intended beneficiaries and the intended purpose of FOIA.

In *Burdine*, this Court found that a presumption of discrimination arises under Title VII only after a plaintiff makes a *prima facie* showing that, *e.g.*, he belongs to a protected class, is qualified for a position which was denied, and someone outside the protected class, no more qualified, received the position. In *Burdine*, however, the presumption is easily rebutted as a practical matter. The Title VII employer-defendant, need only produce evidence demonstrating a legitimate business reason for the adverse employment action to rebut the presumption. 450 U.S. at 254-55. Moreover, such a defendant, unlike the FOIA requester, typically has information (such as employee performance evaluations and corporate policy manuals) superior to that possessed by the beneficiary of the *Burdine* presumption. Also, unlike the FOIA requester, a Title VII defendant has access to liberal civil discovery to overcome the presumption of discrimination.

Finally, the *Burdine* presumption favors the intended beneficiaries of Title VII, the alleged victim of discrimination. The FBI's presumption, however, favors agencies

resisting disclosure under FOIA and thus disfavors the intended beneficiaries of this remedial Act. In sum, *Burdine* provides no authority for the FBI's presumption.

Nor does *Basic Inc.* provide any such authority. There, this Court endorsed a presumption that stock purchasers relied upon misstatements by a corporation for purposes of a Rule 10(b)-5 action. Like the *Burdine* presumption but unlike the FBI's presumption, the *Basic Inc.* presumption favors the intended beneficiaries of Rule 10(b)-5. Moreover, like the *Burdine* presumption, the *Basic Inc.* presumption is easily rebutted with any number of factual scenarios readily ascertainable through discovery. 485 U.S. at 248.

The FBI's reliance on *Kungys v. United States* is similarly misplaced. There, this Court held, in pertinent part, that proof that a naturalized citizen has made a material misrepresentation in the citizenship application process gives rise to a rebuttable presumption of ineligibility for citizenship. The *Kungys* presumption too is easily rebutted with facts easily ascertained by the person threatened with denaturalization. 485 U.S. at 777. Also, like the presumptions in *Burdine* and *Basic Inc.*, the presumption in *Kungys* is harmonious with the purpose of the statute at issue in that decision, to protect the public by preventing the naturalization of undeserving persons.

In conclusion, the FBI's presumption, practically irrebuttable and completely at odds with the FOIA's goal of

disclosure, violates the express allocation of the burden of proof by the FOIA.[11]

POINT II

THE PRESUMPTION SOUGHT BY THE FBI IS CONTRARY TO THE LEGISLATIVE HISTORY OF THE FOIA

The FBI has yet to identify a single page of the legislative record in which committees or members of Congress even discussed, much less approved, a presumption that all criminal investigative sources are "confidential." Indeed, the history of the FOIA militates against such a presumption.

As we detail below, the enactment of 7(D) was part of a larger revision of Exemption 7 generally, motivated by Congress' displeasure with the expansive interpretation given to it by the courts of appeals, particularly in the District of Columbia Circuit. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 156 n.7 (1989). Instead, Congress

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[11] In *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, this Court held, *inter alia*, that the burden of proof requirements of the FOIA do not, by themselves, mandate case-by-case analysis. 489 U.S. at 778-79. In *Reporters Committee*, however, this Court imposed upon the agency the substantial burden of proving that a discrete category of documents will always result in a privacy violation of greater gravity than any FOIA-based public interest that might be served by disclosure. Here, the FBI seeks to relieve itself of any real burden by obtaining a holding that the entire universe of information provided by all criminal investigative sources is automatically exempt, a result clearly at odds with the FOIA's allocation of burdens. (*See* Point III *infra*).

sought to be responsive to specific concerns of agencies like the FBI, while at the same time denying them the blanket rule that Exemption 7 was becoming. Thus, to construe the term "confidential" as the FBI does, would essentially eliminate it from the statute and re-create precisely the result that Congress sought to overturn when it amended Exemption 7 in 1974. Moreover, nothing in any of the subsequent amendments to Exemption 7 alters that basic proposition in any way. Congress simply made adjustments responding to specific problems raised by law enforcement agencies, none of which are relevant here.

A. The Legislative History Favors A Case-Specific Determination That A Person Or Entity Is "A Confidential Source"

The series of cases[12] that the 1974 revisions of Exemption 7 repudiated, like the cases relied upon by the FBI here, reduced to insignificance the FBI's burden of proof. Senator Hart, a sponsor of the original version of the 1974 revisions of Exemption 7 perceived those cases as "a stone wall" holding that, once an agency demonstrated that documents sought were "investigatory file[s] compiled for law enforcement purposes," then "[t]he court would have the exemption applied without the

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[12] *See Center for National Policy Review of Race and Urban Issues v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1974); *Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974); *Aspin v. Dep't of Defense*, 491 F.2d 24 (D.C. Cir. 1973); *Weisberg v. United States Dep't of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1974).

need of the agency to show why the disclosure of the particular document should not be made. That, we suggest, is not consistent with the intent of Congress when it passed this basic Act in 1966." 120 Cong. Rec. 17,033 (1974) (*Source Book II*[13] at 332-33). Senator Kennedy condemned the "series of recent cases in the District of Columbia" that "has applied the seventh exemption of the act woodenly and mechanically . . . " 120 Cong. Rec. 17,034 (1974) (*Source Book II* at 335).

As first presented, the revised provision exempted:

> Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication or constitute a clearly unwarranted invasion of personal privacy, (C) disclose the identity of an informer, or (D) disclose investigative techniques and procedures.

120 Cong. Rec. 17,033 (1974) (*Source Book II* at 332). In discussing the amendment, Senator Hart, consistent with his rejection of *Weisberg*, *Aspin*, *Ditlow*, and *Center for National Policy Review*, used formulations reflecting his view that courts should conduct case-specific inquiries about the need for non-disclosure. Immediately after introducing the amendment, Senator Hart obtained unanimous consent to print in the record an excerpt of a report by a committee of the New York City Bar that stressed

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[13] Using the same designation as the petitioners, "*Source Book II*" refers to Comm. on the Judiciary, United States Senate, *Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts and Other Documents (1975).*

"the need to preserve the identity of sources of information *in particular cases* . . . " 120 Cong. Rec. 17,034 (1974) (*Source Book II* at 334) (emphasis in the original). Senator Kennedy, too, caused that passage to be repeated in the record after his statement of support for the proposed amendment. (120 Cong. Rec. 17,035 (1974)) (*Source Book II* at 338). Elsewhere, addressing the newly revised *in camera* review provisions in the FOIA, Senator Kennedy stated that "with the new provisions it should be clear that there can be no blanket claim of confidentiality under any of the exemptions." 120 Cong. Rec. 17,019 (1974).[14]

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[14] Congress' view that particular circumstances be articulated by an agency seeking the benefit of Exemption 7 is consistent with the view Congress took toward another confidentiality provision that first appeared in the 1966 Act. Exemption 4 provides an exemption for matters that "are trade secrets and commercial or financial information obtained from a person and privileged *or confidential*." Following extensive oversight hearings that, in part, set the stage for the 1974 amendments to FOIA, a congressional report condemned a form, used by the Price Commission, that solicited requests for confidentiality by persons filling out a form requesting permission to increase prices. The oversight committee called for case-specific determinations of confidentiality:

> "As was stressed over and over during the hearings, the exemptions contained in subsection (b) of the act are permissive and not mandatory and *the committee knows of no agency that has specific statutory authority to extend blanket exemption, let alone to solicit the exemption of confidentiality. It is the duty of each agency to determine on an individual basis whether or not specific information fits the test of confidentiality as provided in subsection (b)(4) of the FOI Act.*

H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. 16 (1972) (*Source Book II* at 23) (emphasis supplied).

The Senate passed Senator Hart's floor amendment, 120 Cong. Rec. 17,041 (1974) (*Source Book II* at 351-52), but, thereafter, the conference committee, in response to concerns raised by President Ford, reopened discussion of Exemption 7 and other matters. President Ford did not raise any concerns about either the definition of sources deserving confidentiality or the agencies' burden in proving that a person deserves confidentiality for purpose of Exemption 7. The President's main Exemption 7 concern was to prevent release of any information provided by an informant. *See* letters between President Ford and Senator Kennedy (Aug. 20 and Sept. 23, 1974). (*Source Book II* at 368-72).

The conference committee revised Exemption 7, in pertinent part, by substituting the term "a confidential source" for "an informant" and, responding to President Ford's concern, by permitting non-disclosure of "confidential information" that was provided "only by a confidential source." 120 Cong. Rec. 36,871 (1974) (Sen. Hart) (*Source Book II* at 451). In explaining the change from "an informant" to "a confidential source," the conference committee used a formulation contemplating case-specific proofs that a source is confidential:

> The substitution of the term "confidential source" in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality *or in circumstances from which such an assurance could be reasonably inferred.*

H.R. Conf. Rep. No. 93-1380, 93d Cong., 2d Sess. 12 (1974) (*Source Book II* at 230) (emphasis added).[15]

In the most extreme formulation of its position, the FBI quotes, as authority for its presumption, Senator Hart's floor statement that "all the FBI has to do is state that the information was furnished by a confidential source and it is exempt." (Pet. Br. at 28). When Senator Hart made that statement, he was not, as the FBI implies, addressing the burden of proof in showing that a person or entity is "a confidential source." Rather he was making the entirely different point, in response to President Ford's comments, that *all information* provided by a confidential source (as distinguished from only source-identifying information) would be exempt under the FOIA as revised. 120 Cong. Rec. 36,871 (1974) (Sen. Hart) (*Source Book II* at 451). Clearly, Senator Hart, who expressed strong disapproval of the *Weisberg* line of authority, did not intend by this remark to erase the *de novo* review and burden of proof provisions of the FOIA.

B. The 1974 Legislative History Expressly Disfavors The Use Of Presumptions Of The Sort Urged Here

The District of Columbia Circuit Court decisions that prompted revision of Exemption 7 were the progeny of

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[15] Oddly, the FBI quotes this passage as evidence supporting the presumption of confidentiality. (Pet. Br. at 28). But the emphasized language, which permits confidentiality to be "reasonably inferred" from "circumstances" clearly contemplates a source-specific analysis. The word "circumstance" means "a *specific part*, phase or attribute of the surroundings or background *of an event, fact or thing . . .* " *Webster's Third New International Dictionary* (1961) (emphasis supplied).

EPA v. Mink, 410 U.S. 73 (1973). *Mink* held that, once an agency states, in an affidavit, that a document has been classified as "Top Secret" or "Secret" pursuant to an executive order, a district court must inquire no further, *e.g.* through *in camera* inspection, but rather must deem the document exempt under the FOIA Exemption 1. *Id.* at 84. The *Mink* rule gave rise to the holdings of the *Weisberg* line of authority that a district court need inquire no further under Exemption 7 once an agency attests that a file is "investigatory." And the *Mink* approach is exactly parallel to the FBI's claim here that all the FBI need do is " 'state that the information was furnished by a confidential source and it is exempt.' " (Pet. Br. at 28) (quoting Senator Hart with approval).

With certain 1974 revisions, Congress emphatically rejected *Mink*[16], just as it rejected the related *Weisberg* line of authority, and, in the course of so doing, broadly condemned the use of presumptions of the type urged here by the FBI, as a device to simplify the district court's fact-finding function.

Implementing its disapproval of *Mink*, Congress passed, *inter alia*, a provision expressly permitting *in camera* inspection of classified documents in order to determine if in fact they had been properly classified. During the debate about a proposed version of the *in camera* inspection provision, Senator Muskie moved that proposed language be stricken that created a presumption in favor of the correctness of an agency's classification

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[16] *See, e.g.*, 120 Cong. Rec. 17,017 (1974) (Sen. Kennedy).

of a document.[17] Senator Muskie observed that the presumption would "shift the burden of proof away from the Government and go against the express language [of the FOIA] . . . that in court review 'the burden of proof shall be on the Government to sustain its action.' " 120 Cong. Rec. 17,023 (1974) (*Source Book II* at 304). Arguing for his proposal, Senator Muskie added:

> *Why should [an agency head] be given a statutory presumption in addition if he cannot make his case on its merits.* He is in a better position to do that than anyone else.
>
> Then, if he cannot make a case on its merits, I say he is not entitled to a presumption.
>
> *We ought not to classify information by presumptions, but only on the basis of merit.* And only the head of an agency involved can make that case. And if he cannot make it, then he ought to lose it and not find it possible to get sustained only through the support of a statutory presumption.

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[17] The language objected to by Senator Muskie provided as follows:

> If there has been filed in the record an affidavit by the head of the agency certifying that he has personally examined the documents withheld and has determined after such examination that they should be withheld under the criteria established by a statute or Executive order referred to in subsection (b)(1) of this section, *the court shall sustain such withholding unless,* following its in camera examination, *it finds the withholding is without a reasonable basis* under such criteria.

120 Cong. Rec. 17,023-24 (1974) (*Source Book II* at 306) (emphasis supplied).

120 Cong. Rec. 17,024 (1974) (*Source Book II* at 308-09) (emphasis supplied).[18]

Senator Ervin, speaking as a co-sponsor of the proposal by Senator Muskie, broadly rejected the use of presumptions in construing FOIA exemptions:

> *I strongly support the amendment offered* by the distinguished Senator from Maine, of which I have the privilege of being a co-sponsor, *because it makes certain that when one is seeking public information, or information which ought to be made public, the matter will be heard by a judge free from any presumptions* and free from any artificial barriers which are designed to prevent the withholding of the evidence; and I sincerely hope the Senate will adopt this amendment.

120 Cong. Rec. 17,029 (1974) (*Source Book II* at 322) (emphasis supplied).

The Senate voted overwhelmingly for the Muskie amendment. 120 Cong. Rec. 17,032 (1974) (*Source Book II* at 328), resoundingly rejecting the type of presumption urged by the FBI here.

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[18] Senator Chiles maintained that even a rebuttable presumption in favor of agency withholding violated the *de novo* judicial review function envisioned in the Act:

> However, to raise the opinion of one person, especially an interested party, to that of a rebuttable presumption is to destroy the possibility of adequate judicial oversight which is so necessary for the Freedom of Information Act to function.

120 Cong. Rec. 17,028 (1974) (*Source Book II* at 319).

C. The 1974 Legislative History And The Congressional Testimony Of Law Enforcement Representatives During The Hearings Preceding The 1986 Amendments Suggest A Narrow Definition Of "A Confidential Source"

As discussed in Point IV, the FBI's proposed presumption lacks a factual basis because, *inter alia*, given the constitutional and legal requirements that (1) witness names and statements be turned over to criminal defendants for use at trial, and (2) trials be open to the press and public, the FBI cannot, within the law, promise confidentiality to most of the "sources" it communicates with during a criminal investigation, (*e.g.*, witnesses). Apparently anticipating that argument (which was raised below), the FBI argues that by "a confidential source" Congress intended to include potential and actual witnesses as well as sources requiring anonymity or secrecy. (*See* Pet. Br. at 20 n.15 and J.A. 37-38, Superneau Decl. ¶ 49).

The FBI presents no legislative history to support its definition. In fact, the legislative history demonstrates that the law enforcement community as well as Congress concerned themselves with sources that desired complete anonymity and secrecy, not sources that anticipated public exposure through pre-trial discovery and trial testimony.

Thus, in a "Memorandum Letter" Senator Hart authored and placed in the record in 1974, he used the terms "confidentiality" and "anonymity" interchangeably:

> A question has been raised as to whether my amendment might hinder the Federal Bureau of Investigation in the performance of its investigatory duties. The Bureau stresses the need for confidentiality in its investigations. I agree completely. All of us recognize the crucial law enforcement role of the Bureau's unparalleled investigating capabilities.
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> • • •
>
> *If informants' anonymity – whether paid informers or citizen volunteers – would be threatened, there would be no disclosures.*

120 Cong. Rec. 17,040 (1974) (*Source Book II* at 351) (emphasis supplied).[19]

Indeed, the FBI itself quotes a formulation by Senator Thurmond equating the need for confidence with the need for secrecy: "The FBI has always staked its high reputation on the fact that information given to it in confidence *is kept secret*." 120 Cong. Rec. 17,037 (1974) (*Source Book II* at 343) (quoted in Pet. Br. at 27) (emphasis supplied).

Testifying before Congress, FBI Director Webster did *not* call upon that body to protect witnesses interviewed during routine field operations of the FBI following commission of a crime, but rather expressed concern for the well-being of paid and unpaid tipsters who required

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[19] Elsewhere, Senator Hart stated that the amendments were intended to protect "paid informers or simply concerned citizens who give information to enforcement agencies and desire their identity to be kept confidential." 120 Cong. Rec. 17,034 (1974) (*Source Book II* at 334).

complete anonymity. See *e.g.* Statement of William H. Webster, FBI Director, in *Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs*, 96th Cong., 2nd Sess. (1980) [hereinafter *1980 Hearings*] at 425-507. There, Director Webster spoke of informants' general concern that their identity not be exposed to anyone beyond law enforcement operatives: "We have found that there are those in many segments of society who are refusing to provide us information because they fear their identity may be disclosed under the law." *Id.* at 460. The Director provided numerous detailed examples of "current" or "potential informants" who feared *any* exposure of their identity. *Id.* at 494-507. The Director used the term "confidential source" interchangeably with the notion of paid and unpaid informants' desiring total anonymity. *See, e.g., id.* at 500, ¶¶ 4 and 5.

At the 1980 hearings, Robert Nesoff, National Liaison of the Federal Criminal Investigator's Association, stated that because of the FOIA many agencies found it "impossible . . . to maintain a network of confidential informants . . . [U]nder FOIA many of these informants have become panic stricken about their identities being revealed." *1980 Hearings* at 230.

During the 1981 hearings before Congress, CIA Director William J. Casey argued that FOIA undermined CIA assurances of *secrecy* to sources. *Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) [*1981 Hearings*] at 592. "We must be able to provide human sources with absolute assurance that the fact of their cooperation with the United States will forever be

kept secret and that the information they provide will never be revealed or attributed to them," the Director stated. *Id.*

In his 1981 testimony before Congress, FBI Director Webster again provided a list of paid and unpaid sources who feared *any* disclosure of their identities, especially to criminal defendants.[20] *See 1981 Hearings* at 990-1040. *See also id.* at 1042-79 (detailing the impact of FOIA on DEA sources). Throughout his 1981 testimony, Director Webster expressed a concern that paid and unpaid informants' identities might be exposed to anyone beyond the FBI. *See, e.g., id.* at 855-65. Likewise, in his 1983 and 1984 testimony before Congress, FBI Director Webster was concerned with protecting sources that required total anonymity. *See Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary on S. 774*, 98th Cong. 1st Sess. (1983) [*1983 Hearings*] at 431-82; *see also id.* at 62-93; *Freedom of Information Act: Hearings on S. 774 Before a Subcomm. of the House Comm. on Government Operations*, 98th Cong., 2d Sess. (1984) [*1984 Hearings*] at 810-26.

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[20] Director Webster's listing also detailed the concerns of local law enforcement entities that (1) their status as FBI sources be kept secret, *see e.g. 1981 Hearings* at 991 ¶ 6; (2) their locally prepared reports be kept secret, *id.* at 990 ¶ 6; (3) their local sources be kept anonymous, *id.* at 990 ¶ 4; and (4) the subjects of their local investigations be kept secret, *id.* at 990 ¶ 6. Director Webster's listing revealed that private entities feared, in many instances, that their exposure as FBI sources would subject them to civil liability from third parties who felt that their right to privacy had been violated. *Id.* at 993 ¶ 5, 994 ¶ 7, 995 ¶ 3 and 998 ¶ 3.

In the 1983 hearings, Senator Hatch equated the law enforcement community's interest in confidentiality with the media's interest in maintaining the absolute anonymity of its sources. Assistant Attorney General Rose stated, "I share your view exactly." *1983 Hearings* at 33, ¶¶ 6-7.

Thus, in the parlance of the congressional deliberations, the term "confidential source" meant a paid or unpaid person or entity desiring anonymity, or secrecy of information, not a source reasonably expecting exposure of identity or information in pre-trial proceedings or trial.[21]

D. The Legislative History Of The 1986 Revisions Provides No Support For The FBI's Presumption

The FBI cites nothing from the congressional record indicating that, either in hearings leading up to the 1986

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[21] The court below erroneously, and without reference to legislative history, opined that Congress must have intended "confidential source" to mean one whose identity would not be disclosed "unless such disclosure is determined by the FBI to be important to the success of its law enforcement objective." (Pet. App. 25a). The circuit court concluded that given the disclosure requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), and the Federal Rules of Criminal Procedure, FBI assurances of complete anonymity "must be exceedingly rare, if they exist at all." (Pet. App. 24a). The *1980, 1981, 1983,* and *1984 Hearings* however reveal hundreds of instances in which unpaid citizens function not as witnesses, whose names and statements must be turned over to defendants, but as reliable tipsters or inside sources who require anonymity or secrecy. It is that category of persons that Congress intended to embrace with the term "a confidential source."

FOIA amendments or in floor discussions, Congress even considered an agency's burden of proof in demonstrating a source to be "confidential," the issue that lies at the heart of this case. As the FBI points out (Pet. Br. at 32), in the 1981 hearings, Assistant Attorney General Jonathan Rose brought to Congress' attention *Lame v. United States Dep't of Justice*, 654 F.2d 917 (3d Cir. 1981), the precedent that was dispositive below. Rose, however, quoted only a passage from *Lame* with which he agreed, opining about the administrative and judicial burdens generally imposed by the FOIA. Rose did not quote from, or comment upon, the holding of *Lame* that an agency must offer case-specific proof that a source is "confidential." *See 1981 Hearings* at 630-31.

Most important, Congress did not purport to overrule *Lame* with its 1986 amendments. A Congressional Research Service ("CRS") analysis of the 1986 amendments to Exemption 7, placed into the Congressional Record by Senator Leahy, a co-drafter and co-sponsor of the 1986 amendments to Exemption 7, referring to the proposed substitution of "could reasonably be expected to" for "would," states in pertinent part:

> The proposed amendment does not appear to be prompted by any particular case or line of cases that have enunciated a contrary standard of the degree of risk of harm that must be shown to justify assertion of Exemption 7(A), (D) or (F).

132 Cong. Rec. 14,299 (1986).

Far from addressing the *Lame* holding, the 1986 amendments were aimed at adopting the holding of a line of cases, unrelated to *Lame*, that an agency need show

only a reasonable tendency, rather than certainty, that text in a withheld document might cause a harm sought to be prevented by Exemption 7. *See Wightman v. Bureau of Alcohol, Tobacco & Firearms*, 755 F.2d 979, 982 (1st Cir. 1985); *Pollard v. FBI*, 705 F.2d 1151, 1155 (9th Cir. 1983); *Yeager v. Drug Enforcement Administration*, 678 F.2d 315, 323 (D.C. Cir. 1982); and *Radowich v. U.S. Attorney, Dist. of Maryland*, 658 F.2d 957, 961 (4th Cir. 1981) (all cited with approval in the CRS analysis, *supra*, 132 Cong. Rec. 14,300 (1986)).

In adopting the holding of those cases, Congress responded to concerns expressed by the intelligence and law enforcement community at hearings in 1980, 1981, 1983, and 1984,[22] that: (1) criminal organizations with institutional memories might be able to piece together a "mosaic" of information from various FOIA disclosures enabling them to identify confidential sources[23]; and (2)

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[22] *See 1980 Hearings* at 459 (FBI Director Webster); *1981 Hearings* at 587-95 (prepared Statement of CIA Director Casey) and at 487-91, 847-65, 973-89 (statement and testimony of FBI Director Webster); *1983 Hearings* at 29, 43, 59 (AAG Rose); 479-80 (Director Webster); *1984 Hearings* at 783 (DAG Dinkins) and at 811-13 (Director Webster).

[23] Explaining the 1986 amendments, Senator Hatch explained:

> Because of the *mosaic problem* with FOIA and the particular threat posed by organizations with historical continuity and an institutional memory and further because *use of the exemptions themselves can become a "piece of the mosaic,"* simply broadening existing exemptions will not cure the problem of organized crime abuse of FOIA.

132 Cong. Rec. 14,040 (1986) (emphasis supplied).

agency employees processing documents under the FOIA have no way of knowing whether facially neutral facts contained in documents might have special meaning to criminals enabling them to construct such a source-identifying "mosaic."[24]

Throughout the hearings law enforcement witnesses testified about the foregoing "mosaic" problem and its attendant chilling effect on potential sources. The FBI has not pointed to a single instance, and respondent has not found one, of the law enforcement community complaining to Congress in the pre-1986 hearings of the difficulty of proving that a source is "confidential." The 1986 amendments simply did not address the issue before this Court.

Had Congress intended to expand the definition of "a confidential source" to include, as the FBI seeks here, all criminal investigative sources, it would have done so expressly. Thus, in 1986, Congress, in accord with various decisions[25] expressly expanded the meaning of "a confidential source" to "includ[e] a State, local, or foreign

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[24] Criticizing the 1974 language, Senator Hatch stated:

> The problem with the narrow "would disclose" language is that there is no way for the DEA to know what the criminal requester knows. The criminal may know that one of his friends always calls a party a "bash" or a soft drink a "pop." If one of those words appear in a requested record, he has identified the informant.

132 Cong. Rec. 14,039 (1986).

[25] *See Johnson v. Department of Justice*, 739 F.2d 1514 (10th Cir. 1984); *Terkel v. Kelly*, 599 F.2d 214, 216 (7th Cir. 1979), cert. denied, 444 U.S. 1013 (1980); *Biberman v. Federal Bureau of Investigation*, 528 F.Supp. 1140 (S.D.N.Y. 1982); *Malizia v. United States Dep't of Justice*, 519 F.Supp. 338, 350 (S.D.N.Y. 1981).

agency or authority or any private institution which furnished information on a confidential basis . . . " 5 U.S.C. § 552(b)(7)(D).

In sum, nothing in the legislative history of the 1986 amendments supports the FBI's claim that Congress intended by those amendments to permit a nearly irrebuttable presumption that all criminal investigative sources are "confidential source[s]" under the Act.

POINT III

PRIOR DECISIONS OF THIS COURT UPHOLDING A CATEGORICAL APPROACH TO CERTAIN FOIA EXEMPTIONS DO NOT PROVIDE SUPPORT FOR THE FBI'S PRESUMPTION

The FBI contends that this Court's approval of a categorical approach to Exemption 7(C), *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989); Exemption 7(A), *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978); and Exemption 5, *FTC v. Grolier, Inc.*, 462 U.S. 19 (1983), justifies the nearly irrebuttable presumption of confidentiality urged here. (Pet. Br. at 24-25). *See also Nadler v. United States Dep't of Justice*, 955 F.2d 1479, 1486 n.7 (11th Cir. 1992); *Dow Jones*, 917 F.2d at 577.

In fact, this Court's categorical approach in other cases is not dispositive here. First, the approach urged here is not categorical; it is universal. Under the unique structure of Exemption 7(D), once a source is deemed

"confidential" then *all* the information provided by that source in the course of a criminal or lawful national security intelligence investigation is deemed exempt. Thus, by defining "a confidential source" to be everyone who communicates with the FBI in the course of such investigation, the FBI would exempt the entire universe of investigative records and information. Such an approach is far different from the categorical exemption of well-defined types of documents in *Reporters Committee* (rap sheets), *Robbins* (NLRB witness statements), and *Grolier* (attorney work product documents). In *FTC v. Grolier*, this Court approved the "establish[ment] [of] a *discrete* category of exempt information . . . " 462 U.S. at 27 (emphasis supplied), quoted with approval in *Reporters Committee*, 489 U.S. at 779.

Second, the language of Exemption 7(C) relied upon in *Reporters Committee* to justify a categorical approach ("could reasonably be expected"), *see id.* at 777 n.22, while reappearing in Exemption 7(D), does not bear upon or relate to any agency's burden in proving a source "confidential." Rather it defines, as in Exemption 7(C), the degree of risk that an agency must demonstrate in proving that text in a particular document might expose the identity of a confidential source or information provided by that source. Thus, while arguably the language "could reasonably be expected" in Exemption 7(D) might allow a categorical determination that specific types of *documents* will always reveal the identity of a confidential source, *e.g.*, a document that keys informants' code numbers to their actual names and addresses, that statutory phrase does not permit a determination that an entire universe of *persons and entities* are always "confidential source[s]."

Third, in adopting a categorical approach to Exemption 7(C), this Court sought to avoid the adjudicative difficulties attendant upon the difficult balancing of FOIA-based public interests against various privacy interests. *Id.* at 778-80. As the Third Circuit noted (Pet. App. 29a), under Exemption 7(D), however, the courts are not called upon to engage in any complex balancing of competing values. Rather they are called upon to make only a straightforward factual determination whether an investigative source was expressly or impliedly assured confidentiality. While there may be some administrative burden for the FBI in demonstrating that a source is "confidential," it is, as the Third Circuit noted (Pet. App. 28a) for Congress, not the courts, to relieve that burden by redefining the term "confidential" or by clearly delineating the FBI's proposed presumption.

In sum, neither *Reporters Committee*, *Robbins*, nor *Grolier* provides any authority for the FBI's presumption.

POINT IV

THE FBI'S PROPOSED PRESUMPTION LACKS A FACTUAL AND LEGAL FOUNDATION

Were this Court to conclude that neither the plain language of the FOIA nor its legislative history precludes a presumption of the type urged here, nevertheless, the presumption should be rejected because it lacks a sufficient factual and legal footing.

First, there is simply no evidence that a presumption is necessary. "Presumptions typically serve to assist courts in managing circumstances in which direct proof,

for one reason or another, is rendered difficult." *Basic Inc. v. Levinson*, 485 U.S. at 245.

There is undocumented speculation in petitioners' brief that "it is highly unlikely that [FBI agents involved in this case] would be able to swear, from memory, to the circumstances of interviews that occurred so long ago." (Pet. Br. at 36). And there is the completely unsubstantiated claim that "records of witness interviews typically provide little detail about the conduct of the interview . . . " (*Id.*) But the FBI points to no evidence setting forth: (1) whether or not the FBI requires agents to record promises of, or requests for, confidentiality; (2) whether or not the FBI requires agents to record, on specific forms, the time, place and manner of witness interviews; (3) whether or not the FBI requires its agents to promise confidentiality to certain categories of targets, suspects, or witnesses; and (4) whether, and under what circumstances the FBI identifies itself to persons it interviews. In short, it may well be that typical FBI records of witness interviews provide ample, easily accessible evidence of the circumstances surrounding source interviews, notwithstanding the FBI's speculation. Indeed, in *Lame*, the decision complained of by the FBI, the agency, on remand, thoroughly satisfied the case-specific proof demanded by the Third Circuit. *Lame v. United States Dep't of Justice*, 767 F.2d 66 (3d Cir. 1985). Moreover, as discussed above, when appearing before Congress, the FBI was able to detail hundreds of instances wherein sources discussed their concerns and fears about confidentiality, providing further evidence that the FBI records the circumstances of source interviews. Having failed to

provide any evidence demonstrating the need for a presumption, the FBI should not be rewarded with the sweeping rule it seeks.

Second, a presumption must be "consistent with" and "support[ ] the congressional policy embodied" in the relevant Act of Congress. *Basic Inc.*, 485 U.S. at 245. The basic policy of the FOIA is to implement " 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.' " *Department of Air Force v. Rose*, 425 U.S. at 360-61 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)). As discussed at length above, the presumption militates against disclosure and effectively creates an exemption that is not clearly delineated for all criminal investigative sources.

Third, a presumption must be "supported by common sense and probability." *Basic Inc.*, 485 U.S. at 246. There is simply no evidence that all or even most persons or entities who communicate with the FBI about anything during a criminal investigation do so with an expectation of confidentiality or that the FBI must assure such confidentiality in order to conduct its investigative work.

In truth, contrary to the FBI's claim that in the "setting" of criminal investigative communications "confidentiality is inherent" (Pet. Br. at 8), there are numerous inter-dependent variables that create a broad spectrum of possibilities concerning confidentiality.

Thus, for example, there is no evidence that the FBI regularly identifies itself during field interviews of witnesses following commission of a crime, notwithstanding the FBI's reference to a 1978 FBI manual that is not in the

record and that the FBI does not claim is publicly available. (Pet. Br. at 20 n.14).[26] Obviously, if a witness is unknowingly speaking to an undercover FBI agent, he/she will have no expectation that the FBI will maintain confidentiality.

Moreover, while anonymous tipsters and paid informants inferrably will almost always want confidentiality, and therefore may be presumed confidential, it is not at all probable that most citizen volunteers who witness some discrete aspect of a crime, *e.g.*, the color of a car or the hair texture of a person, will expect or need confidentiality. In many "setting[s]" to use the FBI's term, witnesses speaking to the FBI do not even know they have witnessed a crime and thus have no reason to expect confidentiality when answering simple factual questions. Even when bystanders know they have witnessed a crime and that they are speaking to the FBI, they may have no reason to fear identification by perpetrators, especially if they are simply offering their observation of a discrete, seemingly unimportant, aspect of the *res gestae*.

Also, given the disclosure requirements of the Jencks Act, 18 U.S.C. § 3500, *Brady v. Maryland*, 373 U.S. 83 (1963), and federal discovery rules, Fed. R. Crim. P. 16 and 26.2, and given the fact that most court proceedings are open to the press and public, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980),[27] it is clear that an FBI

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[26] See respondent's Motion for Supplementation of the Record.

[27] The FBI suggests that trial proceedings have "attendant judicial restraints and protections" (J.A. 38) that might serve to protect "confidential sources" who publicly testify. But trials are

agent can only rarely make an honest and lawful promise of confidentiality to a source.

Thus, there exists no "inherent" confidentiality because there is no invariable "setting" for criminal investigative interviews; the FBI is not entitled to a presumption far removed from the factual reality of its activities.

As mentioned in Point II, *supra*, in order to justify its presumption, the FBI suggests that "confidential" for purposes of Exemption 7(D) means something considerably broader than anonymous or secret and embraces even sources that fully anticipate public testimony at trial. (Pet. Br. at 20 n.15). But, as detailed in Point II, the law enforcement concerns that Congress addressed with its 1974 and 1986 revisions of Exemption 7, focussed on the need to assure anonymity of sources and secrecy for certain information provided by sources. It is simply not "probable", *see Basic Inc.*, 485 U.S. at 246, either that anyone who speaks to the FBI about anything during a criminal investigation expects anonymity or that any entity that communicates with the FBI expects that the information it supplies will be kept secret.

Given the failure of the FBI to demonstrate the necessity for a presumption, given its dissonance with the

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public, *Richmond Newspaper*, and the press widely reports legal proceedings. The names of source-witnesses in the underlying criminal case here now appear in thousands of law books throughout the nation.

basic goal of the FOIA and given the absence of a factual basis for the presumption, this Court should reject it.[28]

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals for the Third Circuit with regard to FOIA Exemption 7(D) should be affirmed.

Respectfully submitted,

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[28] Even were this Court to adopt the FBI's presumption, the judgment below should be affirmed because, as the Third Circuit has noted, the FBI has failed to offer any evidence that the sources in this case knew they were communicating with FBI agents. (Pet. App. 25a). Obviously, unwitting sources cannot expect to receive confidentiality from the FBI. *See also* respondent's Motion for Supplementation of the Record.